No. 76-1243

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

TONY M. SMITH AND NELLIE SMITH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

MYRON C. BAUM,
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TONY M. SMITH AND NELLIE SMITH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the district court (App. A, *infra*, pp. 1a-9a) is not officially reported. The opinion of the court of appeals (App. B, *infra*, p. 10a) is not yet officially reorted.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 11a-12a) was entered on December 13,

1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether cash payments to state police troopers that are designated as meal allowances are excludable from income under Section 119 of the Internal Revenue Code of 1954, which excludes from an employee's gross income the value of meals provided to him by his employer if the meals are furnished on the employer's business premises.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 61(a) and 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Treasury Regulations on Income Tax (1954 Code), Section 1.119-1 (26 C.F.R.), are set forth in Appendix D, *infra*, pp. 13a-18a.

STATEMENT

Respondent [1] is a uniformed patrolman of the Mississippi Highway Safety Patrol. During 1972, the state paid respondent $1,482 to reimburse him for personal funds he expended on meals purchased during his hours of duty. This amount was paid to respondent pursuant to state regulations which allowed the Mississippi Highway Safety Patrol to reimburse

[1] References to "respondent" are to Tony M. Smith. Nellie Smith is a party solely because she filed a joint return with her husband for the year at issue.

a patrolman for meal expenses actually incurred on working days up to a maximum of $5 per day.[2] Highway patrol policy required the patrolmen to notify their superiors when and where they stopped for meals while on patrol duty so that they could be reached in an emergency (App. A, *infra*, pp. 1a-2a).

In order to qualify for the reimbursement, the patrolman was required to submit a monthly expense voucher showing the amount spent for on-duty meals each working day and certifying that the amounts listed were actual expenditures. After audit, the vouchers were paid by expense checks that were separate from the patrolman's regular salary checks (App. A, *infra*, pp. 1a-2a).

On audit, the Commissioner of Internal Revenue determined that the state's payment for meal expenses was includable in respondent's gross income (App. A, *infra*, p. 3a). In this refund suit brought by respondent in the United States District Court for the Northern District of Mississippi, the district court acknowledged the broad reach of the definition of "gross income" set forth in Section 61(a) of the Code. It therefore held that the meal payments fell within the scope of "gross income." However, the

[2] In June, 1972, the meal expense allowance was increased to $6 per day (App. A, *infra*, p. 2a n. 2). Respondent received either $5 or $6 per day during 1972, except for three days when he was paid $10 per day while on out-of-state assignment in Knoxville, Tennessee (Stip. par. 10, R. 40). "R." refers to the appendix filed in the court of appeals.

court further held that the meal payments were excludable under Section 119 of the Code, which excludes from an employee's gross income the value of meals provided to him by his employer if the meals are furnished on the employer's business premises (App. A, *infra*, pp. 3a-4a).

In so holding, the district court recognized that *Wilson* v. *United States*, 412 F.2d 694 (C.A. 1), was to the contrary, but felt bound to follow the Fifth Circuit's decision in *United States* v. *Barrett*, 321 F.2d 911 (App. A, *infra*, pp. 4a-5a and n. 5). The court of appeals affirmed *per curiam* on the authority of its prior holding in *Barrett* (App. B, *infra*, p. 10a).

REASONS FOR GRANTING THE WRIT

The question presented is currently before the Court in our pending petition for a writ of certiorari (No. 76-1095) in *Commissioner* v. *Kowalski*, 544 F. 2d 686 (C.A. 3). Like the decision below, the Third Circuit in *Kowalski* has followed the Eighth and Tenth Circuits, which have ruled that Section 119 excludes from gross income cash payments to employees for meals. See *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8); *United States* v. *Keeton*, 383 F.2d 429 (C.A. 10). Accord: *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5). In so holding, the decision below acknowledged that *Wilson* v. *United States*, 412 F.2d 694 (C.A. 1), reached the opposite result. There, the First Circuit held that Section 119 is limited to meals served in kind on the employer's business premises.

For the reasons set forth at pp. 6-11 of our petition in *Kowalski*,[a] the question of the taxability of these cash meal allowances is of considerable administrative importance. This Court should resolve the conflict of decisions among the circuits in order to establish a uniform rule for the tax treatment of such cash payments for meals. However, because *Kowalski* presents the broader question whether cash payments for meals constitute "gross income" under Section 61(a) as well as whether they are excludable under Section 119, the Court may wish to hold this case pending its decision in *Kowalski* (No. 76-1095).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MYRON C. BAUM,
Acting Assistant Attorney General.

STUART A. SMITH,
Assistant to the Solicitor General.

WILLIAM A. FRIEDLANDER,
ALFRED S. LOMBARDI,
Attorneys.

MARCH 1977.

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[a] We are serving counsel for respondent a copy of our petition in *Kowalski*, and a copy of this petition upon opposing counsel in *Kowalski*.

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC 73-113-K

TONY M. SMITH AND NELLIE SMITH, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM OPINION

This action, brought under 28 USC § 1346(a) by plaintiff-taxpayer, Tony M. Smith,[1] seeks to recover individual federal income taxes assessed and collected by the Internal Revenue Service for the calendar year 1972. The taxpayer's claim for refund of $225.80 was, on August 24, 1973, denied in full. The case is submitted to the court upon stipulated facts set forth below.

During the year in issue, Smith was employed by the Mississippi Highway Safety Patrol and actively served as a uniformed patrolman. Although the patrolman was assigned to a regular shift, during which he patrolled the public highways in a certain district, he was subject to call at any time during his

---

[1] Nellie Smith, wife of Tony M. Smith, is a party plaintiff solely because she filed a joint return with her husband.

off hours. Smith's assigned route as a patrolman often took him miles from his home, and highway patrol policy required him, while on duty, to take his regular meals at various restaurants on his assigned route. Smith was also required to notify his superiors when and where he stopped for meals so that he could be reached if needed for immediate duty. State regulations applicable in 1972 allowed the Mississippi Highway Safety Patrol to reimburse a patrolman for meal expenses actually incurred on working days up to a maximum of $5 per duty day.[2] To qualify for this reimbursement, the patrolman was required to submit a monthly expense voucher, showing the sum spent for on-duty meals each working day and certifying that the amounts listed were actual expenditures. Although subject to the stated maximum, reimbursements were limited to actual expenditures as reflected on the monthly vouchers, so that meals costing less than $5 for any day were reimbursed only to the extent of the actual cost claimed on the expense voucher. The patrolman was not paid meal expenses on days he did not work, and he was paid no more than the amounts claimed on the submitted vouchers. After audit, the expense vouchers were paid by expense checks separate from Smith's regular salary checks.

During the year in issue, Smith was in this manner reimbursed $1,482 for personal funds expended on

[2] For the month of June 1972, the meal expense allowance was raised to $6 per duty day.

meals purchased in the line of duty.[3] The Commissioner determined that this item constituted additional unreported income, for which he assessed the deficiency out of which this suit arose.

The sole issue presented for our decision is whether reimbursement of the actual meal expenses incurred by a state law enforcement officer while on duty is excludable from the officer's gross income under § 119 of the Internal Revenue Code of 1954.

We begin by acknowledging that the broad sweep of the general includability section of the Code, § 61 (a),[4] evinces a congressional intent "to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." *Commissioner* v. *Smith*, 324 US 177, 181, 89 L ed 830 (1945). Accord, *Commissioner* v. *Glenshaw Glass Co.*, 348 US 426, 99 L ed 483 (1955); *Commissioner* v. *LoBue*, 351 US 243, 100 L ed 1142 (1956). Thus, any eco-

[3] As previously noted, during the month of June 1972, the reimbursement was raised to $6 per working day, and Smith received this increased reimbursement only for that month. Also, on November 16-18, 1972, Smith performed out-of-state duty and received reimbursements of $10 per day for this out-of-state work.

[4] 26 USC § 61 provides, in pertinent part:

"(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business; . . .

nomic gain accruing to a taxpayer from the pocketbook of his employer and which exists by reason of his employment—and the meal expense reimbursement considered here certainly falls within that category—is presumptively included in gross income, unless the taxpayer can bring his gain clearly within some specific exemption from the general rule of includability. *Glenshaw Glass Co., supra* at 430; *Commissioner* v. *Jacobson*, 336 US 28, 49, 93 L ed 477 (1949); *Helvering* v. *Northwest Steel Rolling Mills*, 311 US 46, 49, 85 L ed 29 (1940).

Recognizing his burden to establish excludability, plaintiff invokes the aid of one of the specific exclusions from § 61(a), § 119, which provides in pertinent part:

> "There shall be excluded from the gross income of any employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—
>
> (1) in the case of meals, the meals are furnished on the business premises of the employer . . ."

The taxpayer buttresses his contention that the exclusion provided in § 119 applies here by relying upon *U.S.* v. *Barrett*, 321 F. 2d 911 (1963). There, the Fifth Circuit, in ruling on the precise question now before this court, allowed § 119 excludability of reimbursements to members of the Mississippi Highway Safety Patrol for line-of-duty meal expenses.[5] In

[5] Two other circuits have also applied § 119 to exclude from gross income expense money paid to state troopers for meals required to be consumed at roadside restaurants while on duty. *U. S.* v. *Morelan*, 356 F. 2d 199 (8 Cir. 1966); *U. S.* v. *Keeton*, 383 F. 2d 429 (10 Cir. 1967). By way of dicta in a recent decision, *Jacobs* v. *U. S.*, 493 F. 2d 1294 (1974), the Third Circuit appears to agree that § 119 applies in "state trooper" cases. Contra, *Wilson* v. *U. S.*, 412 F. 2d 694 (1 Cir. 1969).

Barrett, the government argued that, before the value of furnished meals may be excluded from gross income under § 119, the meals must be furnished (1) on the business premises of the employer; (2) in kind; and (3) for the convenience of the employer. In upholding the taxpayer's right to exclude the meal expense reimbursements, the Fifth Circuit held that the business premises requirement of § 119 was satisfied when the meals in question were consumed by on-duty employees whose job "covers every road and highway in the state twenty-four hours a day every day." *Barrett*, supra, at 912. The business premises of the Mississippi Highway Safety Patrol were thus held to encompass roadside restaurants located on the routes served by highway patrolmen. The government's second contention, that the meals furnished must be provided in kind, was rejected by the court as an artificial distinction. Noting that the employees there were reimbursed only for money actually spent on meals, the court saw no difference between providing the officers with food and reimbursing them for money spent in obtaining that food. The court concluded by holding that most significant in determining the application of § 119 excludability was the

"convenience of the employer" test, which was found to be met in these words:

> "The patrolmen were required to eat meals along their regular routes so that the patrol areas would not be unguarded during mealtime, and they were required to notify their headquarters where they were eating so that they could be reached in case of an emergency. The sums paid the patrolmen so that they could eat at restaurants on their tour of duty were thus primarily for their employer's benefit. These sums were, therefore, properly excluded from income." *Barrett*, supra, at 913.

Barrett is legally indistinguishable from the case sub judice and, therefore, controlling, unless that decision has been since overruled by the Supreme Court.

Defendant asserts that, despite the clearly adverse holdings in *Barrett*, *Morelan* and *Keeton*, the Supreme Court, in a subsequently decided case, *U.S.* v. *Correll*, 389 US 299, 19 L ed 2d 537 (1967), effectively overruled those cases by requiring a more restrictive interpretation of § 119. We find this contention to be unpersuasive, as *Correll* is inapposite to the case sub judice.

In *Correll*, a traveling salesman sought to deduct the cost of his meals eaten on the road as traveling expenses incurred "away from home in the pursuit of a trade or business" pursuant to § 162(a)(2) of the Code.[6] The Commissioner disallowed the deduc-

[6] "(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . .

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business. . . .

tion, ruling that since the taxpayer's sales trips did not require his overnight absence from home, the meals were not eaten "away from home" within the meaning of § 162(a)(2) and hence were not deductible. On certiorari, the Supreme Court upheld the Commissioner's overnight rule as a valid construction of the statutory phrase "away from home." Defendant argues that § 162(a)(2) is the deductibility analogue of § 119's excludability provisions, and that there is no significant difference between a traveling salesman away from home for the day and the highway patrolman away from home for the day. If the one may not deduct his unreimbursed out-of-pocket meal expenses, defendant argues, the other should not be permitted to exclude cash reimbursements for those same expenses.[7]

Defendant's argument must fail because, although § 119 and § 162(a)(2) are similar in purpose, they are not precise analogues. The requirements for deductibility under § 162(a)(2)—that the expenditures

[7] Defendant also cites *Wilson* v. *U. S.*, supra, as adopting the *Correll* approach toward this question of § 119 applicability. Although it is true that *Wilson* does mention *Correll*, the case is more properly read as an inter-circuit disagreement with the interpretation given § 119 by *Barrett*, *Keeton* and *Morelan*, and not as mandated by *Correll*.

occur away from home while in the pursuit of business—are distinct from the § 119 criteria of "convenience of the employer" and "on the business premises." Absent constitutional challenge, each case must, of course, be measured by the disparate requirements of applicable statutes and not by the defendant's, or a court's, notions of similarities between cases. It is simply not inevitable to the congressional plan that, given two identically situated taxpayers, only one of whom is reimbursed for meal expenses, both, or neither, must be allowed the respective benefits of §§ 119 and 162(a)(2). Indeed, the court in *Correll* impliedly recognized differences in the scope of the two statutes when it noted that § 162(a)(2) speaks of deductibility of expenses of meals *and* lodging, thus suggesting a congressional intent to allow meal expense deductions only when business travel entails lodging away from home. Conversely, § 119 speaks of excludability of the value of meals *or* lodging, thus negativing any inference that both must be provided for excludability to result.

The *Correll* decision, moreover, may be read as a judicial ratification of a Commissioner's ruling clarifying an utterly ambiguous statutory phrase. As the court in *Correll* observed, the "away from home" phrase in dispute there "is obviously not self-defining." *Correll*, supra, at 542. It was regarded that § 162(a)(2) required some additional construction beyond the literal text of the statute if the "away from home" requirement was to have meaning at all. The Commissioner had provided that construction by promulgating the overnight rule, which the court

approved as reasonable. On the other hand, the operative phrases of § 119—"the value of any meals or lodging", "for the convenience of the employer," and "on the business premises of the employer"—are by and large sufficiently definite to require no additional administrative gloss. The express terms and legislative history of § 119 reflect an unambiguous congressional intent to exempt from gross income the value of meals furnished an employee for the convenience of the employer, independent of any § 162(a)(2) provisions. Hence, *Correll's* restrictive approach, which did not in any way refer to § 119, need not apply here.

We have alluded to the differences between § 162(a)(2) as discussed in *Correll* and § 119 involved here. These differences emphasize that §§ 162(a)(2) and 119 are different exclusionary plans, with different requirements, different beneficiaries, and different purposes. That the Supreme Court has given a more restrictive reading to an ambiguous phrase in § 162(a)(2) does not require this court to similarly restrict the scope of § 119.

We, therefore, conclude that the exclusion from gross income provided by § 119 is applicable in this case, and that Smith is entitled to recover.

The parties are directed to present the court with an order consistent herewith.

This, 18th day of November, 1974.

/s/ William C. Keady
Chief Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-1609

TONY M. SMITH AND NELLIE SMITH,
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Dec. 13, 1976

Appeal from the United States District Court for the Northern District of Mississippi.

Before COLEMAN, GODBOLD and HILL, Circuit Judges.

PER CURIAM:

Plaintiffs, a Mississippi highway patrolman and wife, sued for a refund of income taxes for 1972. The government included in income cash payments received by the husband to reimburse him for the cost of meals eaten while on duty. Plaintiffs claimed the payments were excludible under § 119 of the Internal Revenue Code of 1954. The district court granted a refund, relying on *U.S.* v. *Barrett*, 321 F.2d 911 (C.A.5, 1963). The government concedes that *Barrett* controls unless reversed.

We affirm on the basis of *Barrett*. *Accord, U.S.* v. *Morelan*, 356 F.2d 199 (C.A.8, 1966); *Keeton* v. *U.S.* 383 F.2d 429 (C.A.10, 1967). *Contra, Wilson* v. *U.S.*, 412 F.2d 694 (C.A.1, 1969).

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1609

D.C. Docket No. CA DC 73-113 K
TONY M. SMITH, ET AL., PLAINTIFFS-APPELLEES

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Mississippi

Before COLEMAN, GODBOLD and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 13, 1976

Issued as Mandate:

A true copy

Test:

EDWARD W. WADSWORTH
Clerk
U.S. Court of Appeals
Fifth Circuit

New Orleans, Louisiana, Feb. 17, 1977

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished

to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.119-1 Meals and lodging furnished for the convenience of the employer.

(a) *Meals*—(1) *In general.* The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fix-

ing the terms of employment such meals are furnished as compensation.

(2) *Meals furnished without a charge.* (i) Meals furnished by an employer without charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. • • •

(ii) (*a*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

• • • • •

(*c*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (*c*) when there are insufficient eating facilities in the vicinity of the employer's premises.

• • • • •

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

• • • • •

(c) *Rules.* (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals or lodging in kind, the value of such meals and lodging is not ex-

cluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

(d) *Examples.* The provisions of section 119 may be illustrated by the following examples:

• • • • •

Example (5). A Civil Service employee of a State is employed at an institution and is required by his employer to be available for duty at all times. The employer furnishes the employee with meals and lodging at the institution without charge. Under the applicable State statute, his meals and lodging are regarded as part of the employee's compensation. The employee would nevertheless be entitled to exclude the value of such meals and lodging from his gross income.

• • • • •

Example (8). A manufacturing company provides a cafeteria on its premises at which its employees can purchase their lunch. There is no other eating facility located near the company's premises, but the employee can furnish his own meal by bringing his lunch. The amount of compensation which any employee is required to include in gross income is not reduced by the amount charged for the meals, and the meals are not considered to be furnished for the convenience of the employer.

Example (9). A hospital maintains a cafeteria on its premises where all of its 230 employees may obtain a meal during their working hours. No charge is made for these meals. The hospital furnishes such meals in order to have each of 210 of the employees available for any emergencies that may occur, and it is shown that each such employee is at times called upon to perform services during his meal period. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Since the hospital furnishes meals to each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals.

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OCTOBER TERM, 1976

No. 76-1243

UNITED STATES OF AMERICA,
Petitioner,

vs.

TONY M. SMITH AND NELLIE SMITH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OF TONY M. SMITH AND NELLIE SMITH

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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UNITED STATES OF AMERICA,
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vs.

TONY M. SMITH AND NELLIE SMITH,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM OF TONY M. SMITH AND NELLIE SMITH

The question presented is whether amounts paid to Tony Smith as reimbursement for his actual expense incurred for meals while on duty as a Mississippi Highway Safety Patrolman are excludable from gross income under Section 119 of the Internal Revenue Code of 1954 when he was required to eat such meals along the regular routes served so that he could be reached for immediate duty.

Respondents are a uniformed Mississippi Highway Safety Patrolman and his wife who is a party by virtue of filing a joint return. The patrolman during the year 1972

was reimbursed for money actually expended by him for meals purchased while on duty on the highways of the state. He was limited to a maximum of $5 per day (later $6 per day) regardless of the expenditure but did not collect the amount if he was not on duty. He was further limited to the actual amount he expended.

Smith was required to submit a monthly expense voucher certifying to the amounts expended for each on-duty meal as an actual expenditure. These vouchers were audited and paid as an expense check separate from his salary check.

The Respondent, Smith, was required by his employer to be and remain on the highways of Mississippi during his duty hours and to eat his meals while on duty in restaurants along his route. He was required to notify headquarters when and where he was eating so that he could be reached for any immediate duty.

The Commissioner of Internal Revenue on audit disallowed these expense reimbursements as exclusions from income and assessed further tax. Smith paid and sued for a refund.

The United States District Court for the Northern District of Mississippi held (App. A to Petition for Writ) that the reimbursements were excludable from income under Section 119 of the Code reasoning that the patrolman's business premises encompassed the highways and the roadside restaurants in which he was required to take his meals so as to be on immediate call for duty. The Court of Appeals for the Fifth Circuit affirmed (App. B to Petition for Writ) relying upon its earlier decision in an identical case involving the same expense reimbursements for another

Mississippi Highway Safety Patrolman in *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5, 1963).

The position of the Commissioner of Internal Revenue that these expenses were not incurred on the "business premises" of Smith's employer raises a substantial issue for this Court in light of the decisions of various circuits in *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5, 1963); *Commissioner* v. *Kowalski*, 544 F.2d 686 (C.A. 3, 1976); *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8, 1966); and *United States* v. *Keeton*, 383 F.2d 429 (C.A. 10, 1967) which hold in accord with the present case; and *Wilson* v. *United States*, 412 F.2d 694 (C.A. 1, 1969) and *Koerner* v. *United States*, No. 76-1495 (C.A. 4, 1977) which hold contra. Respondents therefore do not oppose the granting of certiorari based upon the question presented in the petition.

Respectfully submitted,

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